No. 11905.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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San Diego Gas & Electric Company, a corporation,
*Appellant,*

*vs.*

United States of America,
*Appellee.*

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## APPELLANT'S BRIEF

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### Jurisdiction.

In compliance with Rule 20 (C. C. A. 9, Subsection 2b) appellant states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

*United States Code Annotated, Title 28, Section 931:* Suits on Tort Claims Against the United States:

"Jurisdiction; liability of United States; . . . (a) Subject to the provisions of this chapter, the United States district court for the district wherein the plaintiff is resident or wherein the act or

omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages; . . . "

*United States Code Annotated, Title 28, Section 941 (c):* DEFINITIONS.

" 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in the line of duty. . . . "

*United States Code Annotated, Title 28, Section 933:* REVIEW.

"(a) Final judgments in the district courts in cases under this subchapter shall be subject to review by appeal . . .

1. in the circuit courts of appeals in the same manner and to the same extent as other judgments of the district courts; . . . "

*United States Code Annotated, Title 28, Section 225 (Judicial Code, Sec. 128):* APPELLATE JURISDICTION:

"(a) *Review of final decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—*First:* In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

It appears from the plaintiff's complaint [R. pp. 2, 3, 4], that it is based upon a claim against the United States for money only on account of damage to plaintiff's property caused by the alleged negligent acts of a non-commissioned officer in the United States Coast Guard acting in line of duty. Said damage is alleged to have occurred on or about September 5, 1945, in San Diego County, California.

## Statement of the Case.

The plaintiff and appellant appeals from the judgment of dismissal rendered against it pursuant to the motion of the defendant and appellee at the conclusion of the presentation of the plaintiff's evidence.

This is an action under the "Federal Tort Claims Act." Appellant, a public utility company, maintained certain transmission lines across Mission Gorge in San Diego County, California, together with the supporting towers. The wire cables ranged in height from 187 feet to 210 feet above the floor of the Gorge. The above equipment was damaged when a United States Coast Guard airplane collided with the wires on September 5, 1945. The accident occurred in midafternoon and the day was clear.

At the time of the accident the Coast Guard plane was being operated by Glen O. Ferrin, a non-commissioned officer in the United States Coast Guard, who was then acting in the line of duty. The plane had been dispatched from a Coast Guard Air Station on San Diego Bay and was on a routine training flight at the time of the accident.

Shortly prior to the accident the plane was observed in flight by the three witnesses who testified for the plaintiff. The witnesses were then at Tinkham Center, an establishment on the edge of Mission Valley, which runs in a general east and west direction. Tinkham Center is approximately one-half to three-quarters of a mile to the east of the point where the power line crosses Mission Gorge. Mission Valley narrows

into Mission Gorge at about the point, or slightly east of the point, where the power line crosses the Gorge.

The witnesses first saw the plane as it flew up the valley in an easterly direction, at an altitude of approximately 200 to 235 feet. It passed in front of Tinkham Center and then turned left, or north, disappearing from sight as it went up a canyon behind a hill. About five minutes later the plane returned in approximately the same course and started down the valley in a westerly direction, still at an altitude of from 200 to 235 feet. The plane entered Mission Gorge and passed from the view of the witnesses. The course of the plane may be clarified by reference to plaintiff's Exhibits No. 1, No. 2 and No. 3. Approximately a minute thereafter the witnesses were advised by a motorist that the accident had occurred and two of the witnesses departed for the scene thereof, arriving within five minutes. They observed the wrecked plane from 300 to 500 feet south of the damaged wires. The motor of the plane sounded normal at all times and there was no indication prior to the accident that the plane was in distress.

The reasonable cost of the repairs to appellant's transmission lines and supporting equipment necessitated by the accident was $2,166.89.

The only issue submitted for the decision of the District Court was whether the collision with appellant's transmission lines was proximately caused by the negligence of the pilot of the plane, and the Court in granting the motion for dismissal adjudged that ap-

pellant had failed to establish such negligence by a preponderance of the evidence. Appellant contends that such negligence was established and that it was error to dismiss the action.

No findings of fact or conclusions of law were made by the District Court.

## Specifications of Error.

Appellant respectfully submits that the Honorable District Court erred:

1. In granting appellee's motion for a dismissal of the above action.
2. In failing to give appellant the benefit of the reasonable inferences to which it was entitled under the evidence.
3. In holding that it was not established by the preponderance of evidence that the damage in question was proximately caused by the negligence of appellee's pilot.
4. In not applying the doctrine of *res ipsa loquitur*.

## Summary of Argument.

POINT I: In granting appellee's motion to dismiss, the Honorable District Court failed to give appellant the benefit of the reasonable inferences to which it was entitled.

POINT II: The preponderance of the evidence established that the accident was due to the negligent operation of appellee's airplane.

POINT III: The doctrine of *res ipsa loquitur* is applicable to this case.

## ARGUMENT

### POINT I.

**Appellant Is Entitled to the Benefit of All Reasonable Inferences.**

In granting appellee's motion to dismiss, the Honorable District Court failed to give appellant the benefit of the reasonable inferences to which it was entitled. This is apparent from the statements of the Court that appear in the record, such as:

> "Suppose the plane had dropped on this power line. Suppose it was up 1,000 feet and had dropped. Nobody seems to have followed the airplane to where the accident occurred." [R. p. 55.]
>
> " . . . Can I assume from the evidence that the plane was flying low at this particular point; that it was flying low at the point where the impact was?"
>
> MR. FOCHT: Certainly, your Honor, it is the more reasonable inference to draw than any other inference that can be drawn.
>
> THE COURT: It is up to you to prove your case not by inferences but by facts." [R. pp. 56, 57.]
>
> " . . . Undoubtedly, the plane came in contact with the power lines. How that happened nobody knows. If he was flying at a low altitude, in contravention of the Civil Aeronautics rule, before he disappeared from view—I can't say at that time, at the time of the accident, that he was flying at that low altitude. There is nothing in the evidence to that effect. I don't know that I can carry any such inference to the extent that you

> argue I should carry it. He might just as well have been up a thousand or two thousand feet at that point." [R. p. 78.]

In effect by its ruling the Court declared that in such a case no plaintiff could prevail unless he produces an eye witness who followed the course of the plane to the very point of impact.

The general rule is stated in *32 Corpus Juris Secundum,* Evidence, Sec. 1044, p. 1129:

> "A verdict or finding may be based on reasonable inferences fairly drawn from the facts in evidence and a material fact need not be proved by direct evidence; it is sufficient if there is evidence from which the fact can properly be inferred. The triers of fact may draw all reasonable and legitimate inferences and deductions from the evidence adduced before them; indeed, it is their duty to make, and give consideration to all inferences and deductions which may properly be drawn. A reasonable inference is as truly evidence as the matter on which it is based. . . . "

Numerous authorities are cited in the above text in the support of this fundamental rule.

Courts have frequently declared that so-called "circumstantial evidence" may outweigh direct or eyewitness testimony.

> *Adams v. Johnson,* 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246;
>
> *The Struggle v. United States,* 9 Cranch (U. S.) 71, 3 L. Ed. 660;

*Olberg v. Kroehler,* 8 Cir., 1 F.( 2d) 140;
*Parsons v. Easton,* 184 Cal. 764, 195 Pac. 419;
*20 Am. Jur.,* Evidence, Sec. 1189, p. 1041.

The following quotation from the opinion of the District Court in the case of *Kelley Island Lime & Transport Co. v. City of Cleveland,* 47 F. Supp. 533, 540, is particularly applicable to the case at bar:

> "The law never intended to impose such hardships on parties injured as to deprive them of a right to recover if eyewitnesses cannot be produced to show how the obstruction was created. *Rules of reason and sound common sense dictate that the law's demands may be satisfied in the absence of eyewitness testimony by proof of facts from which but one reasonable inference can be drawn.* (Italics supplied.)

The only reasonable inference that can be drawn from the facts established by the evidence in the present case is that the appellee's airplane continued to be flown at an altitude of from 200 to 235 feet above the terrain after passing out of the sight of appellant's witnesses and until it struck the wires. After the plane passed from the vision of the witnesses R. H. Tinkham and Kenneth R. Tinkham, they continued to look in the direction of Mission Gorge, watching for the plane to come out of the gorge. [R. pp. 58, 59, 75.] The distance from the point where the airplane passed out of the vision of the witnesses to the power line was estimated at from 300 to 600 feet. [R. pp. 66, 75.] Within one or two minutes after the plane passed out

of the sight of the witnesses, the witness R. H. Tinkham was notified that the plane had crashed [R. p. 60], and he and the witness Frank Darnell arrived at the scene of the crash within five minutes. [R. p. 67.] Also significant is the fact that the plane came to rest from 300 to 500 feet past the power line in the direction the plane had been traveling. [R. p. 37.] Such evidence is not consistent with an inference that the plane might have dropped on the power line from a higher altitude.

It is submitted that only one inference may reasonably be drawn from the above facts. That inference is that the plane struck the power line immediately after passing from the sight of the witnesses, while traveling at an altitude of approximately 200 feet. Any inference that the plane after passing from view climbed to a higher altitude and fell upon the wires because of motor failure or other reasons is not reasonable and must be rejected.

While the District Court made no formal findings of fact it is apparent from the record that it refused to find that the airplane in question maintained its low altitude until the impact with the wires. On the contrary, it took the position that it was an equally probable inference that the plane, after its disappearance, climbed to an altitude of 1,000 or 2,000 feet and then dropped on the wires. From the undisputed evidence, such an occurrence was not only improbable but impossible.

The present case is analogous to the case of *Mateas v. Fred Harvey,* 9 Cir., 146 F. (2d) 989. In that case

as in this, the trial court granted the defendant's motion to dismiss made at the conclusion of the presentation of the plaintiff's evidence, but no findings of fact or conclusions of law were made. This Court reviewed the comments of the District Court wherein it remarked that the record showed no basis for liability, stating (at page 993):

> " . . . This judicial comment is in effect a finding that the evidence adduced, taken at its face value, cannot support an inference either of negligence or of a violation of warranty. The last and concluding thought in the comment is ' . . . the record shows no basis for liability.' This ruling, as would be a formal finding to the same effect, is clearly erroneous."

The judgment of the District Court was reversed.

It is submitted that the ruling of the Honorable District Court embraced in its comments wherein it denied the plaintiff the benefit of legitimate and reasonable inferences is clearly erroneous.

## POINT II.

### It Was Established by a Preponderance of the Evidence That the Accident Was Due to the Negligent Operation of Appellee's Airplane.

Section 60.105 of the Civil Air Regulations of the Civil Aeronautics Board of the Department of Commerce enacted pursuant to the authority contained in *49 U. S. Code Annotated,* Sec. 551, and in effect at the time of the accident in question provided as follows:

> "*Minimum safe altitudes.* Except when necessary for taking off and landing, aircraft shall be flown:
>
> (a) when over the congested areas of cities, towns, settlements, or open-air assemblies of persons, at altitudes sufficient to permit emergency landings outside such areas and in no case less than 1,000 feet above such areas, and
>
> (b) when elsewhere than as specified in paragraph (a), at an altitude of not less than 500 feet, except over water or areas where flying at a lower altitude will not involve hazard to persons or property on the surface."

At the trial of this case it was stipulated that the above regulation was applicable to Coast Guard pilots and that they were bound thereby to the same extent as civilian pilots. [R. pp. 22, 23.]

Such a departmental regulation has the force and effect of law if it is not in conflict with express statutory provision.

*Maryland Casualty Co. v. United States,* 251 U. S. 342, 349; 40 S. Ct. 155, 157; 64 L. Ed. 297;
*W. A. Hover & Co. v. Denver R. G. W. R. Co.,* 8 Cir., 17 F. (2d) 881, 884.

The violation of such a departmental regulation imposing a duty for the protection of others is negligence.

*W. A. Hover & Co. v. Denver R. G. W. R. Co.,* 8 Cir., 17 F. (2d) 881, 884.

It is submitted that the evidence conclusively establishes that appellee's airplane was negligently operated as a matter of law by virtue of the violation of the above regulation by the pilot. It can not fairly be urged that the flight was "in an area where flying at a lower altitude will not involve hazard to persons or property on the surface." The line of flight leading up to the accident bordered on a traveled highway and the scene of the accident was adjacent to the city limits of San Diego. Flight at a height of approximately 200 feet must have constituted a hazard to the property involved, wires from 187 feet to 210 feet in height, and their supporting towers.

Aside from the Civil Air Regulations, the evidence of negligence is overwhelming. At all times while the plane was within the sight and hearing of the witnesses its engines sounded normal and it appeared to be in no distress. No reasonable interpretation can be placed upon the manner of flight but that it was voluntary. To intentionally fly at this low height, to enter a canyon or gorge and to collide with the power line equipment in broad daylight is consistent only with a finding

of negligence. The field of aviation is not so new or novel that it may be denied that certain recognized standards of conduct exist. The hazards incident to low flying are self evident.

Where the evidentuary facts are not in conflict or dispute the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action.

*Home Indemnity Co. of New York v. Standard Accident Insurance Co.,* 9 Cir., No. 11661, (decided May 11, 1948);
*Kuhn v. Princess Lida,* 3 Cir., 119 F. (2d) 704.

It is submitted that the only conclusion which reasonably follows from the evidence in this case is that the accident was caused by the negligent operation of appellee's airplane.

## POINT III.

### The Doctrine of Res Ipsa Loquitur Is Applicable.

While there has been some diversity of opinion expressed by appellate courts throughout the United States as to whether the doctrine of *res ipsa loquitur* applies to aviation accident cases, it is the rule in this State established by the California Supreme Court that the doctrine does so apply.

In the case of *Smith v. O'Donnell,* 215 Cal. 714, 12 Pac. (2d) 933, it was held that the doctrine was applicable to a case arising out of a midair collision of two airplanes. The basis of the doctrine is stated in the opinion of that case, as follows, (at p. 722):

> "The foundation or reason for the doctrine is based upon probabilities and convenience. When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the instrumentality, and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the defendant can the most conveniently prove it raises a presumption of negligence which the defendant must overcome by proof that there was in fact no negligence."

In *Smith v. Pacific Alaska Airways, Inc.,* 9 Cir., 89 F. (2d) 253, cert. den. 302 U. S. 700, 58 S. Ct. 20, 82 L. Ed. 541, the applicability of the doctrine of *res ipsa loquitur* to aviation accident cases was accepted

by this Court. In that case the administrator of an airplane passenger who was killed by the crash of an airplane belonging to the defendant brought suit to recover damages for his death. The plaintiff proved the plane crash and rested, relying upon the doctrine of *res ipsa loquitur*. The defendant introduced evidence to meet the *prima facie* case arising under the doctrine and the jury returned a verdict for the defendant. The Circuit Court of Appeals, in reversing the judgment for the defendant because of the receipt of certain incompetent evidence, did not question the applicability of the doctrine.

In *Smith v. O'Donnell, supra,* in applying the rule of *res ipsa loquitur,* the California Supreme Court said (at page 723):

> " . . . If the proper degree of care is used a collision in midair does not ordinarily occur, and for that reason the doctrine was properly submitted to the jury."

It is submitted that such comment applies with stronger reason to the facts of the case at bar. Surely if the proper degree of care is used a collision between an airplane and a stationary ground object does not ordinarily occur, particularly in broad daylight when no mechanical difficulty or unusual weather condition is indicated.

The facts of the present case are similar to those in the case of *Sollak v. State of N. Y.,* 1929 U. S. Av. R. 42, (N. Y. Ct. Cl. 1927), one of the first applications of the doctrine of *res ipsa loquitur* to a case involving a

claim for damages caused by an airplane crash. In that case the automobile in which the claimant was riding was stopped on a public highway adjacent to an airport. An airplane piloted by a state officer struck the automobile, causing the injuries complained of. The claimant relied upon the doctrine of *res ipsa loquitur,* and the defendant offered no explanation as to how the collision occurred. While the New York Court of Claims did not specifically mention the doctrine, it expressly applied the principles of *res ipsa loquitur* in its opinion, stating as its conclusion of law that the accident occurred through the fault and negligence of the airplane pilot.

In *Seaman v. Curtiss Flying Service,* 247 N. Y. S. 251, the facts are stated in the opinion as follows, (at page 252):

> "This is an action for damages for death caused by the crash of an airplane in which deceased was a passenger. On the day of the accident the weather was clear, and the wind was blowing not over 15 miles an hour from northwest. The accident occurred at Curtiss Field, Long Island, and just before crashing the plane was seen to turn and dip its right wing. Plaintiff's theory was that the cause of the crash was the negligent act of an over-confident pilot making a sharp turn at too steep a bank at a low altitude, at a place where it was reasonably to be expected that upward currents of air might tip the wing of his plane, thereby exposing its passenger to danger."

The New York Supreme Court in reversing a judgment in favor of the defendant stated (at page 253):

> "The charge was likewise prejudicial in its failure to charge the doctrine of *res ipsa loquitur,* which had, under the facts appearing in this record, application to this case as a rule of evidence to aid the jury in passing upon the issue of liability."

In *Kadylak v. O'Brien,* 1941 U. S. Av. R. 8, (U. S. D. C. W. D. Pa. 1941), a rudder control cable broke, necessitating a forced landing which resulted in the death of a small boy on the ground. The Federal District Court held that the burden was upon the owner of the airplane to establish freedom from fault, saying:

> "The present case is of that class in which the instrumentality that produced the injury was under the control and management of the defendants, and the accident was such as does not happen if due care has been used."

In *English v. Miller,* 43 S. W. (2d) 642 (Texas Civ. Appeals), the airplane crash resulting in the litigation occurred when the pilot of the aircraft was engaged in acrobatics at a low altitude. The opinion states that the doctrine of *res ipsa loquitur* would have been applicable but for the fact that the plaintiff had pleaded specific acts of negligence which under Texas procedure precluded reliance upon the doctrine.

A number of decisions from other jurisdictions have declined to apply the doctrine of *res ipsa loquitur* to cases arising out of airplane crashes, upon the theory that aviation has not yet reached such a stage of de-

velopment that it can be said that the accident in question would not ordinarily occur without negligence. This contention is aptly answered by the opinion in an English case decided in 1936. In the case of *Fosbroke-Hobbs v. Airwork, Ltd.,* 56 LI. L. R. 209, 53 T. L. R. 254, 81 Sol. J. 80, 1938 U. S. Av. R. 194 (K. B. England 1936), the Court said in this regard:

> "It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails and passengers all over the world, and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a common-place method of travel, supplementing, though not superseding, rail and sea transport. Railways were just as great an innovation when they took the place of the stage coach, yet the courts found no difficulty in applying to them by the year 1844 the same doctrine that had formerly been applied to stage coaches."

In any event, the type of accident involved in the case at bar, a collision between a low-flying airplane and a stationary object in broad daylight, is one where reasonable men should be able to say that the balance of probabilities is in favor of negligence and hence *res ipsa loquitur* is applicable. (See Prosser On Torts (1941 ed.), Sec. 43, p. 292.)

While the doctrine of *res ipsa loquitur* has most frequently been applied to cases where the passenger-carrier relationship existed, the generally accepted view and that adopted in California extends the doctrine to all cases where the facts meet the fundamental principles of the rule, irrespective of any contractual relationship between the parties.

*Judson v. Giant Powder Co.,* 107 Cal. 549, 40 Pac. 1020; 29 L. R. A. 718, 48 Am. St. Rep. 146;
*Griffen v. Manice,* 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630.

In the *Judson* case, the California Supreme Court quoted with approval the following language from the opinion in *Rose v. Stephens, Etc. Co.,* 11 F. 438:

> "Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties."

That the application of the doctrine in California is in no way dependent upon a passenger-carrier or a contractual relationship is further illustrated by cases where the doctrine has been applied to a collision between the defendant's moving vehicle and the plaintiff's parked vehicle, a type of case analogous to the case at bar.

*Slappery v. Schiller,* 116 Cal. App. 274, 2 Pac. (2d) 577;

*Bauhofer v. Crawford,* 16 Cal. App. 676, 117 Pac. 931.

It is submitted that a Federal Court sitting in California is bound by the California rule that the doctrine of *res ipsa loquitur* is applicable to aviation accident cases and the further rule that the application of the doctrine is not dependent upon the existence of a carrier-passenger or contractual relationship. The Federal Tort Claims Act (28 U. S. C. A., Sec. 931) provides that the government shall be liable under circumstances where the United States if a private person would be liable in accordance with the law of the place where the act or omission occurred. Since the decision in the case of *Erie R. C. v. Tompkins,* 304 U. S. 64, 82 L. Ed., 1188, 58 S. Ct. 817, 114 A. L. R. 1487, the Federal Courts have held that questions of presumptions and burden of proof are questions of substantive law, controlled by state precedents, and have regarded themselves bound under that decision by state precedents on such questions.

*Cities Serv. Oil Co. v. Dunlap,* 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201;

*Sampson v. Channell,* 1 Cir., 110 F. (2d) 754, 128 A. L. R. 394 cert. den. 310 U. S. 650, 84 L. Ed. 1415, 60 S. Ct. 1099;

*Hagan & Cush Co. v. Washington Water Power Co.,* 9 Cir., 99 F. (2d) 614;

*54 Amer. Jur.,* United States Courts, Sec. 358, p. 982;

*Anno.* 128 A. L. R. 405.

In *Hagan & Cush Co. v. Washington Water Power Co., supra,* this Honorable Court held that the state decisions on *res ipsa loquitur* were binding upon the Federal Court and in particular that the state ruling as to the effect of the inference of negligence governed. In California the inference of negligence which is created by the application of the doctrine of *res ipsa loquitur* may not be disregarded by the trier of the facts and creates a *prima facie* case which necessitates a judgment in favor of the plaintiff in the absence of evidence rebutting the inference.

*Michener v. Hutton,* 203 Cal. 604, 265 Pac. 238, 59 A. L. R. 480;
*Manuel v. Pac. Gas & Elec. Co.,* 134 Cal. App. 512, 25 Pac. (2d) 509;
*19 Cal. Jur.,* Negligence, Sec. 132, p. 717.

In *Michener v. Hutton, supra,* the California Supreme Court said (at page 609):

> "One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss. However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, or, in other words, to give application to the principle of *res ipsa loquitur,* the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff's *prima facie* case."

## Conclusion.

It is respectfully submitted that the decision and judgment of the Honorable District Court dismissing the present action is against the clear weight of the evidence. The District Court, in refusing to find that the airplane in question maintained its low altitude from the time it left the sight of the witnesses until it collided with the power lines, deprived appellant of the benefit of the reasonable inferences to be drawn from the proven facts. The only conclusion that can be drawn from the undisputed facts is that the damage in question proximately resulted from the negligence of appellee's pilot. The pilot was negligent as a matter of law in flying at an altitude less than that prescribed by the Civil Air Regulations. Irrespective of the regulations, the facts are consistent only with a finding of negligence, the pilot having guided his plane into Mission Gorge at a low altitude and collided with a stationary ground object in broad daylight. The doctrine of *res ipsa loquitur* is applicable to the present case. The Supreme Court of California has ruled that the doctrine is applicable to airplane accident cases, and in California the doctrine raises an inference that, unless rebutted, requires a judgment for the plaintiff. The Federal Courts sitting in California are bound by these California precedents. Aside from California precedents, the doctrine of *res ipsa loquitur,* by its very nature, is applicable to the case at bar.

It is respectfully submitted that upon the record presented and the points and authorities cited above that the judgment should be reversed.

Respectfully submitted,

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